Supreme Court, U.S.
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IN THE

Supreme Court of the United States

QWEST CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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209 pp

QUESTIONS PRESENTED

1. Could the Ninth Circuit, in the context of reviewing a state regulator's implementation of FCC rules under the Telecommunications Act of 1996, second-guess the Eighth Circuit's determination on Hobbs Act review that those rules were unlawful?

2. Did the Ninth Circuit err by upholding a state regulator's imposition of a collocation requirement based on an FCC statutory interpretation that this Court had rejected as contrary to the Telecommunications Act of 1996, and by refusing to reconsider its ruling after the D.C. Circuit, on direct Hobbs Act review, vacated as contrary to the Act an FCC rule imposing the very same collocation requirement?

3. Could the Ninth Circuit adopt a standard of review of state regulators' implementation of the Telecommunications Act of 1996 that disables federal court review to ensure compliance with federal law and that effectively delegates plenary authority to state regulators to create purportedly federal obligations without any basis in federal law?

PARTIES TO THE PROCEEDING

AT&T Communications of the Pacific Northwest, Inc.

Gillis, William P., in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Hemstad, Richard, in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Levinson, Anne, in her official capacity as Chairperson of the Washington Utilities and Transportation Commission

MCI Metro Access Transmission Services, Inc.

MCI Telecommunications Corporation

Qwest Corporation, formerly known as U S WEST Communications, Inc.

Sprint Communications Company L.P.

Washington Utilities and Transportation Commission

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court as follows:

On June 30, 2000, U S WEST, Inc., the parent and sole shareholder of petitioner U S WEST Communications, Inc., merged with and into Qwest Communications International, Inc. Qwest Communications International, Inc. is a publicly held corporation that has no parent company. No publicly held company owns ten percent or more of the stock of Qwest Communications International, Inc.

On July 6, 2000, petitioner U S WEST Communications, Inc. was renamed Qwest Corporation. Qwest Corporation is now a wholly owned subsidiary of Qwest Communications International, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iii

TABLE OF APPENDICES vii

TABLE OF AUTHORITIES x

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Telecommunications Act of 1996 4

B. The FCC's Local Competition Order and the Proceedings in the Eighth Circuit and This Court 6

C. The FCC's Interpretation of "Necessary" and the Proceedings in This Court and the D.C. Circuit 7

D. The WUTC and Ninth Circuit Proceedings Below 8

REASONS FOR GRANTING THE PETITION 11

I. THE NINTH CIRCUIT'S RULING ON THE COMBINATION REQUIREMENT INVADED THE HOBBS ACT JURISDICTION OF THE EIGHTH CIRCUIT. 11

TABLE OF CONTENTS — Continued

II. THE NINTH CIRCUIT'S COLLOCATION DECISION IGNORES THIS COURT'S AUTHORITATIVE CONSTRUCTION OF THE TELECOMMUNICATIONS ACT AND STANDS IN DIRECT CONFLICT WITH A DECISION OF THE D.C. CIRCUIT. 16

III. THE COURT BELOW APPLIED A STANDARD OF REVIEW THAT GIVES STATE REGULATORS PLENARY AUTHORITY TO CREATE FEDERAL OBLIGATIONS AND DISABLES FEDERAL COURTS FROM ENSURING THAT THOSE REGULATORS FOLLOW FEDERAL LAW. 20

A. The Act Defines a Narrow Role for States in Approving Arbitrated Agreements, and Federal Court Review Is the Exclusive Tool for Ensuring that States Stay Within That Role. 20

B. A Standard of Review That Authorizes Any and All State Action Not Directly Prohibited Threatens Federal Primacy. 22

CONCLUSION 25

TABLE OF APPENDICES

Page

APPENDIX A: Ninth Circuit's Decision in *MCI Telecommunicaitons, Inc. v. U S WEST Communications, Inc.*, Nos. 98-35819, 98-35820, and 98-35822 ..... 1a

APPENDIX B: Ninth Circuit's Decision in *U S WEST Communications, Inc. v. AT&T Communicaitons of the Pacific Northwest, Inc.*, Nos. 98-35789, 98-35828, and 98-35829 ..... 18a

APPENDIX C: Ninth Circuit's Decision in *U S WEST Communications, Inc. v. Sprint Communications Co.*, Nos. 98-35821 and 98-35823 ..... 21a

APPENDIX D: Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment in *MCI Telecommunications, Inc. v. U S WEST Communications, Inc.*, No. C97-1508R (Consolidated) (W.D. Wash.) 24a

APPENDIX E: Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment in *U S WEST Communications, Inc. v. AT&T Communicaitons of the Pacific Northwest, Inc.*, No. C97-1320R (Consolidated) (W.D. Wash.)..... 55a

APPENDIX F: Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment in *U S WEST Communications, Inc. v. Sprint Communications Co.*, No. C97-1764R (W.D. Wash.) 78a

TABLE OF APPENDICES — Continued

APPENDIX G: Washington Utilities and Transportation Commission Order Approving Interconnection Agreement in *In re the Petition for Arbitration on an Interconnection Agreement Between MCImetro Access Services, Inc. and U S WEST Communications, Inc.*, No. UT-960310 ..... 87a

APPENDIX H: Washington Utilities and Transportation Commission Order Modifying Arbitrator's Decision and Arbitrator's Recommendations, and Approving Interconnection Agreement With Modifications in *In re the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S WEST Communications, Inc.*, No. UT-960309 ..... 93a

APPENDIX I: Washington Utilities and Transportation Commission Order Approving Interconnection Agreement With Modification in *In re the Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Co. and U S WEST Communications, Inc.*, No. UT-960347 ..... 97a

APPENDIX J: Excerpts of Arbitrator's Report and Decision in *In re the Petition for Arbitration on an Interconnection Agreement Between MCImetro Access Services, Inc. and U S WEST Communications, Inc.*, No. UT-960310 (Washington Utilities and Transportation Commission) 109a

TABLE OF APPENDICES — Continued

APPENDIX K: Excerpts of Arbitrator's Report and Decision in *In re the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S WEST Communications, Inc.*, No. UT-960309 ..... 117a

APPENDIX L: Arbitrator's Report and Decision in *In re the Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Co. and U S WEST Communications, Inc.*, No. UT-960347 (Washington Utilities and Transportation Commission) 124a

APPENDIX M: Order from the United States Court of Appeals for the Ninth Circuit in *MCI Telecommunicaitons, Inc. v. U S WEST Communications, Inc.*, Nos. 98-35819, 98-35820, and 98-35822 ..... 142a

APPENDIX N: Order from the United States Court of Appeals for the Ninth Circuit in *U S WEST Communications, Inc. v. AT&T Communicaitons of the Pacific Northwest, Inc.*, Nos. 98-35789, 98-35828, and 98-35829 ..... 145a

APPENDIX O: Order from the United States Court of Appeals for the Ninth Circuit in *U S WEST Communications, Inc. v. Sprint Communications Co.*, Nos. 98-35821 and 98-35823 147a

APPENDIX P: Statutory Provisions, 47 U.S.C. §§ 251, 252, 260, 261 ..... 149a

APPENDIX Q: Regulatory Provision, 47 C.F.R. § 51.315 ..... 171a

TABLE OF AUTHORITIES

CASES

Page

AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999) ... *passim*
Comsat Corp v. FCC, 114 F.3d 223 (D.C. Cir. 1997) ... 22
Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd 4761 (1999) ... 8, 18
GTE Service Corp. v. FCC, 205 F.3d 416 (7th Cir. 2000) ... 8, 10, 18, 19, 23
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd 15499 (1996) (codified in pertinent part at 47 C.F.R. §§ 51.301 *et seq.*) ... 6, 7, 18
Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ... 6, 12
Iowa Utilities Board v. FCC, No. 96-3321, — F.3d — 2000 WL 979117 (8th Cir. July 18, 2000) ... 7, 14, 23
MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157 (D. Or. 1999) ... 18
MCI Telecommunications Corp. v. U S WEST Communications, 204 F.3d 1262 (9th Cir. 1999) ... 2
NAACP v. Federal Power Commission, 425 U.S. 662 (1976) ... 22
U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 2000 WL 249692 (9th Cir. Mar. 3, 2000) ... 2
U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004 (D. Ariz. 1999) ... 18

TABLE OF AUTHORITIES — Continued

U S WEST Communications, Inc. v. Minnesota Public Utilities Commission, 55 F. Supp. 2d 968 (D. Minn. 1999) 18

U S WEST Communications, Inc. v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3669 (U.S. June 29) (No. 99-1641), *pet. for reh'g filed* (U.S. July 24, 2000) 15

U S WEST Communications, Inc. v. Sprint Communications Co., 2000 WL 249696 (9th Cir. Mar. 3, 2000) 2

STATUTES

5 U.S.C. § 706 17
28 U.S.C. § 1254(1) 2
28 U.S.C. §§ 2341 *et seq.* 4
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*) 2, 4
47 U.S.C. § 251 ..... 2, 4
47 U.S.C. § 251(a) 21
47 U.S.C. § 251(b) 21
47 U.S.C. § 251(c) 21
47 U.S.C. § 251(d) 4, 7, 16, 21
47 U.S.C. § 252 2
47 U.S.C. § 252(a) 4
47 U.S.C. § 252(b) 4, 5, 21
47 U.S.C. § 252(c) 5, 6, 21
47 U.S.C. § 252(e) 5, 21, 24
47 U.S.C. § 261(c) 21
47 U.S.C. § 402(a) 4

RULES AND REGULATIONS

47 C.F.R. § 51.315 ..... 8, 12
Supreme Court Rule 12.4 2

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Qwest Corporation[1] respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these related cases.

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[1] As noted in the Rule 29.6 statement, U S WEST Communications, Inc. ("U S WEST") has been renamed Qwest Corporation as the result of a recent merger. To be consistent with the terms used in the decisions below, petitioner will use the name "U S WEST" in this petition.

OPINIONS BELOW

The decision of the court of appeals in *MCI Telecommunications Corp. v. U S WEST Communications* (App. 1a) ("*MCI*") is reported at 204 F.3d 1262 (9th Cir. 2000). The decisions of the court of appeals in *U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 2000 WL 249692 (9th Cir. Mar. 3, 2000) (App. 18a) ("*AT&T*") and *U S WEST Communications, Inc. v. Sprint Communications Co.*, 2000 WL 249696 (9th Cir. Mar. 3, 2000) (App. 21a) ("*Sprint*") are unreported follow-on decisions that contain no independent analysis.

JURISDICTION

The decision of the court of appeals in *MCI* was issued on March 2, 2000. The decisions of the court of appeals in *AT&T* and *Sprint* were issued on March 3, 2000. The court of appeals denied U S WEST's petitions for rehearing or rehearing en banc in *MCI* and *Sprint* on May 8, 2000, and in *AT&T* on May 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner challenges all three judgments in this petition pursuant to Supreme Court Rule 12.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue here, 47 U.S.C. §§ 251 and 252, are reproduced at App. 149a.

STATEMENT OF THE CASE

This case presents two sharp circuit conflicts—each between the Ninth Circuit and a court exercising exclusive jurisdiction under the Hobbs Act to review FCC orders—regarding obligations of incumbent local exchange carriers under the Telecommunications Act of 1996 ("the Act"). It also presents a question of the role of federal courts in reviewing state regulators' implementation of the Act.

Reviewing a state commission's implementation of the interconnection provisions of the Act, the Ninth Circuit upheld state regulators' imposition of regulatory requirements that other federal courts—including this Court and other circuits on Hobbs Act review—have invalidated as contrary to the Act. First, the court below upheld a requirement that U S WEST expend resources to combine network elements on behalf of competing carriers, even though the Eighth Circuit—acting under its *exclusive* jurisdiction pursuant to the Hobbs Act—had vacated the FCC's attempt to impose the identical requirement and recently reaffirmed that holding. Second, the court permitted state regulators to require an incumbent carrier to open its premises to competitors' equipment whenever the competitors might find it "useful," even though this Court has held that "usefulness" is not a legitimate basis for regulating incumbents' activities under the Act. Shortly after the court below released its decisions, the D.C. Circuit, on Hobbs Act review of the same collocation requirement, confirmed that this Court's holding necessarily invalidates broad physical takings such as the one the Ninth Circuit upheld, yielding a direct circuit split.

Both of these errors flowed from the Ninth Circuit's fundamental misunderstanding of its role in the statutory scheme. The Act is not merely a starting point beyond which state regulators may impose any additional federal obligations they choose, particularly when the courts charged with reviewing the FCC's rules have held that the Act bars the FCC from imposing those same obligations. Congress empowered federal courts to "bring [state regulators] to heel" if they exceed their limited authority to apply federal law. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The decisions below essentially disable this check, ceding control of federal telecommunications policy to the states within a single circuit while federal control under Congress's scheme remains intact in the rest of the country. The Ninth Circuit failed to recognize that the Act establishes

a national telecommunications policy, not a virtually blank slate on which each state can write its own purportedly "federal" policy.

Certiorari is warranted in these cases to resolve the sharp conflicts between the Ninth Circuit's illegitimate holdings and the authoritative Hobbs Act determinations by the Eighth and D.C. Circuits and to restore meaningful judicial review of state regulators' implementation of federal telecommunications law.

A. The Telecommunications Act of 1996

As this Court recognized last year, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*), "fundamentally restructures local telephone markets," shifting significant authority over those markets from state regulators to the Federal Communications Commission ("FCC"). *Iowa Utils. Bd.*, 525 U.S. at 371; *see also id.* at 378 n.6 (Congress "unquestionably" took "the regulation of local telecommunications competition away from the states" when it passed the Telecommunications Act, at least "[w]ith regard to the matters addressed" by the legislation.). Section 251 of the Act imposes a series of network- and market-opening obligations on incumbent local exchange carriers ("LECs") to enable new competitors to enter the market, *see* 47 U.S.C. § 251, and Congress specifically charged the FCC with adopting rules to implement those obligations. *See id.* § 251(d)(1). Like most FCC edicts, the FCC rules implementing the Telecommunications Act are directly and exclusively reviewable in the federal circuit courts of appeals pursuant to the Hobbs Act. *See* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2341 *et seq.*

The Act also invites state public utility commissions to aid in the implementation of the FCC's rules. It requires incumbent local exchange carriers and new entrants to negotiate the terms of their relationships, and if voluntary

negotiations fail, authorizes either side to request arbitration by the relevant state public utility commission. *See* 47 U.S.C. § 252(a), (b). In those circumstances, the state commission is authorized to "impos[e] appropriate conditions as required to implement [§ 252(c)]," which in turn requires the commission to "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [Federal Communications] Commission pursuant to [that] section." *Id.* § 252(b)(4)(C), (c)(1). Put simply, any conditions (other than pricing and implementation schedules, *see id.* § 252(c)(2), (3)) imposed under the authority of federal law must be limited to those required to achieve compliance with § 251 and implementing FCC rules. *See also id.* § 252(e)(2)(B).

As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. In order to maintain federal control of federal telecommunications law and policy, Congress subjected state commissions' decisions to judicial review in federal district courts "to determine whether [they] meet[] the requirements of section[s] 251 and [252]." 47 U.S.C. § 252(e)(6). This Court has noted that such review is vital to ensuring the primacy of federal regulation under the Act: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.[2] For purposes of this case, the most important aspect of § 252(e)(6) district court review is that the reviewing court must determine whether

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[2] The role of federal court review was not at issue in *Iowa Utilities Board*, which focused instead on who would determine the federal policy that state regulators would implement: "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." *Id.*

the state regulator's arbitral decision "meet[s] the requirements of" § 252, including that section's requirement that state regulators follow FCC rules in arbitrating disputes. *See* 47 U.S.C. § 252(c)(1).

B. The FCC's Local Competition Order and the Proceedings in the Eighth Circuit and This Court

Section 251(c)(3) of the Act obligates incumbent LECs "to provide, to any requesting telecommunications carrier . . . , nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). The incumbent must further "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." *Id.* The FCC adopted a series of rules implementing this provision. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (hereinafter "*Local Competition Order*") (codified in pertinent part at 47 C.F.R. §§ 51.301 *et seq.*).

Petitioner U S WEST, other incumbent carriers, and state public utility commissions petitioned for review of the FCC order under the procedures laid out in the Hobbs Act. Pursuant to those procedures, the petitions were consolidated into a single court—the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit vacated several of the FCC's rules, including rules requiring an incumbent, upon a competing carrier's request, to combine separate network elements purchased by the competitor. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

The FCC and others successfully challenged several aspects of the Eighth Circuit's decision in this Court. *See Iowa Utils. Bd.*, 525 U.S. 366. The parties did not seek review of the vacation of the rules requiring incumbents to

combine separate elements, and this Court never addressed those rules. On remand, the Eighth Circuit directed the parties to address the effect of this Court's decision on a number of FCC rules, including the still-vacated network combination rules. Last month, the court issued a decision reaffirming its earlier holding that the rules are unlawful. *Iowa Utils. Bd. v. FCC*, No. 96-3321, — F.3d —, 2000 WL 979117, at *13 (8th Cir. July 18, 2000).

C. The FCC's Interpretation of "Necessary" and the Proceedings in This Court and the D.C. Circuit

Section 251(c)(6) of the Act requires incumbent carriers to open their offices to their rivals' equipment if that equipment is "*necessary* for interconnection or access to unbundled network elements"—a duty known as "physical collocation." 47 U.S.C. § 251(c)(6) (emphasis added). The FCC interpreted "necessary" to include anything that might be "used" or "useful" for interconnection by a competitor. *Local Competition Order*, 11 FCC Rcd 15499, 15794 ¶ 579 (1996).[3]

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[3] The FCC had determined that it would be "necessary" for a new entrant to have access to an incumbent's plant whenever the competitor would suffer "any increase in cost" at all without access. *See Iowa Utils. Bd.*, 525 U.S. at 390. Hence, the FCC defined anything that would be "used" by or "useful" to a competitor as "necessary." *Local Competition Order*, 11 FCC Rcd 15499, 15794 ¶ 579 (1996).

The FCC also articulated this definition in connection with a different subsection of § 251(c). The Act requires an incumbent carrier to provide requesting carriers with unbundled access to certain network elements, to be determined by the FCC. *See* 47 U.S.C. § 251(c)(3), (d)(2). In making that determination, the FCC must consider whether particular elements are "necessary" to provision of local telephone service (if the elements are proprietary), or whether failure to provide access would "impair" the requesting carrier's ability to provide such service (if elements are nonproprietary). *Id.* § 251(d)(2). It was in this context that this Court reviewed the FCC's definition of "necessary" in *Iowa Utilities Board*, 525 U.S. at 387-92.

In *Iowa Utilities Board*, this Court invalidated the FCC's interpretation of "necessary" in a related provision, § 251(d)(2), as contrary to the language of the Act and legislative intent. *Iowa Utils. Bd.*, 525 U.S. at 389; *see infra* at 16-17. The FCC, however, continued to interpret "necessary" to mean "used or useful" for collocation purposes. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4776-77 ¶ 28 (1999). Incumbent LECs petitioned for review in the D.C. Circuit under the Hobbs Act, and earlier this year that court, following this Court's reasoning, invalidated the FCC's interpretation as overbroad and unsupported by the statute. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422-24 (2000).

D. The WUTC and Ninth Circuit Proceedings Below

In 1996, three competitive LECs separately began negotiating with U S WEST, an incumbent LEC, for interconnection in the State of Washington pursuant to § 251 of the Act. The competitive LECs were MCImetro Access Transmission Services, Inc. ("MCImetro"); Sprint Communications Company, L.P. ("Sprint"); and AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). In each case, the parties were unable to resolve all issues by negotiation, and each competitive LEC requested arbitration by the Washington Utilities and Transportation Commission ("WUTC") pursuant to § 252. Following a hearing in each case, the appointed arbitrator issued separate reports in November and December 1996 resolving the outstanding issues in all three agreements.

In particular, the arbitrator in all three cases imposed a requirement that, in providing unbundled network elements purchased by the competitive LEC, U S WEST combine otherwise separate elements at the competitor's request. At the time, this provision was mandated by FCC rules. *See* 47

C.F.R. § 51.315(c)-(f) (reproduced at App. 171a). Separately, the arbitrator declined to require U S WEST to allow physical collocation of the competitive LECs' remote switching equipment on U S WEST's premises in the MCImetro and AT&T agreements. Collocation was not raised in the Sprint arbitration.

The WUTC adopted the arbitrator's decision in each case, except that it reversed the decision not to allow collocation of remote switching units (it did not require collocation of other equipment). The WUTC applied the FCC's definition of "necessary" as "useful," and concluded that remote switching units met that standard and that MCImetro and AT&T would be at a competitive disadvantage without collocation. *See* App. 89a-90a, 94a-95a. *See also* App. 111a, 120a. The WUTC therefore ordered U S WEST to allow MCImetro and AT&T to collocate remote switching units on U S WEST's premises. *See* App. 89a-90a, 94a-95a. Although the WUTC entered its order after the Eighth Circuit had vacated the combination rules, the WUTC did not address the effect of the decision on the combination provisions in the agreements.

U S WEST and the competitive LECs filed suit in the U.S. District Court for the Western District of Washington seeking review of the agreements and the WUTC's orders under § 252(e)(6). Although the district court issued separate orders in the three cases, the parties litigated them together. *See* App. 25a n.1. The district court upheld the WUTC's collocation rulings, but struck down the element combination requirements, recognizing that the arbitrator had applied the vacated FCC rules.

U S WEST then appealed to the Ninth Circuit in all three cases, and the competitive LECs cross-appealed.[4] While the appeals were pending, this Court issued its decision in *Iowa*

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[4] The WUTC also cross-appealed in the *AT&T* case.

Utilities Board, and the Eighth Circuit began its proceedings on remand, which included reconsideration of the validity of the FCC's combination rules in light of this Court's opinion. Nevertheless, the Ninth Circuit chose to second-guess the Eighth Circuit's earlier determination, concluding that "the Eighth Circuit's interpretation of the Act was incorrect." App. 9a. Finding that the Eighth Circuit's vacation of the FCC rules meant only that "the Act does not currently mandate" the WUTC's combination requirement, the court decided that the requirement did not violate the Act and thus must be restored to the agreement. *Id.*

The court went on to uphold the WUTC's collocation provision, even though it recognized that this Court had ruled that the interpretation of the Act on which the WUTC had relied was unlawful. App. 10a. The court disregarded the legal error because it believed that its "task is not to examine possible flaws in the WUTC's decision-making process, but to decide whether a provision resulting from the process . . . has resulted in an agreement" that violates the Act. App. 11a. The panel concluded that "[a]lthough the Act may not require the [collocation] provision, it certainly does not proscribe it." *Id.*[5]

Fifteen days after the court's decision in *MCI*, the D.C. Circuit, on Hobbs Act review, vacated the FCC's collocation rule on the identical legal grounds that U S WEST had argued before the Ninth Circuit. *See GTE Serv. Corp.*, 205 F.3d 416. U S WEST sought rehearing and rehearing en banc in all three cases below, urging the court below to reconsider its decisions in light of (1) the D.C. Circuit's intervening decision vacating the very same collocation standard that the WUTC had applied, and (2) the fact that the Eighth Circuit had vacated the combination rules and that it

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[5] The court explained its reasoning as to both issues in the *MCI* opinion, which it incorporated by reference, without further analysis, in the *AT&T* and *Sprint* decisions.

alone had jurisdiction under the Hobbs Act to reconsider the rules' validity in light of this Court's decision in *Iowa Utilities Board*. The court below denied rehearing in *MCI* and *Sprint* on May 8, 2000, and in *AT&T* on May 25, 2000.

REASONS FOR GRANTING THE PETITION

In the decisions under review, the Ninth Circuit upheld a state regulator's implementation of two separate FCC interpretive rulings, *even though* two other circuits with exclusive jurisdiction under the Hobbs Act had *vacated* those FCC rulings as violative of the Telecommunications Act. In one case, the Ninth Circuit declared that it simply believed its sister circuit's decision on Hobbs Act review to be wrong. In the other, it actually *agreed* that the state regulators had misinterpreted the governing provision of the Act (as authoritatively construed by this Court), but it assumed that state regulators are free to ignore such decisions. The resulting ruling leaves the Ninth Circuit in sharp conflict with two other courts' Hobbs Act determinations regarding significant provisions of the 1996 Act and balkanizes federal telecommunications policy in direct contravention of Congress's intent. It also authorizes state regulators to ignore binding judicial interpretations of the Act and of the FCC rules implementing it, thus turning the Act's jurisdictional scheme on its head.

I. THE NINTH CIRCUIT'S RULING ON THE COMBINATION REQUIREMENT INVADED THE HOBBS ACT JURISDICTION OF THE EIGHTH CIRCUIT.

The Ninth Circuit erred in upholding the WUTC's orders directing U S WEST to reconfigure the pieces of its network to suit its competitors wishes. The court improperly arrogated to itself the determination of the validity of the combination requirement and second-guessed the reasoning of the Hobbs Act court. The Ninth Circuit's illegitimate and

erroneous decision on the merits has resulted in conflicting applications of federal telecommunications law in different circuits—precisely what the Hobbs Act is intended to prevent.

Section 251(c)(3) of the Act obligates incumbent LECs to provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). The FCC adopted a series of rules implementing this provision. One FCC rule generally prohibited incumbents from separating requested network elements that they already combine for themselves. 47 C.F.R. § 51.315(b) (App. 171a) (hereinafter, the "no-separation" rule). Other FCC rules affirmatively required incumbents to build new combinations of elements on demand, even if the incumbents never built such combinations for themselves. *See* 47 C.F.R. §§ 51.315(c)-(f) (hereinafter, the "combination" rules).

As the court below acknowledged, App. 8a, the Eighth Circuit vacated all of those rules in October 1997 because it concluded that they "cannot be squared with" the language of the Act. *Iowa Utils. Bd.*, 120 F.3d at 813 ("[T]he plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent [carriers] to do *all* of the work."). On appeal from the Eighth Circuit, this Court reinstated the no-separation rule. In particular, the Court accepted the FCC's grounding of the rule in the nondiscrimination requirement of § 251(c)(3); the FCC contended that the rule was intended to prevent incumbent carriers from arbitrarily disconnecting elements that were already combined, "not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Iowa Utils. Bd.*, 525 U.S. at 395 (internal quotation marks and citation omitted).

The court below acknowledged that the vacation of the *combination* rules was not appealed to or reviewed by this Court and that "the Eighth Circuit's decision to vacate the

FCC regulation certainly still stands." App. 9a. The court below chose to ignore that decision, however, concluding that "[a]ll this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination." *Id.* And despite the then-pending remand to the Eighth Circuit, in which that court had made clear that it would reconsider the validity of the combination rules, the Ninth Circuit preempted its sister circuit:

> The [Supreme] Court's holding concerning Rule 315(b) [the no-separation rule] . . . confirms that the Eighth Circuit's interpretation of the Act was incorrect. The Court firmly stated that the Act's mention of 'unbundled access' does not even 'remotely imply' that elements must be provided only in uncombined form and never in combined form.

Id. (citing *Iowa Utils. Bd.*, 525 U.S. at 394). Therefore, the court upheld the WUTC requirement as consistent with the Act. *See id.*

The Ninth Circuit's ruling was erroneous on two levels. First, the Eighth Circuit had held, on direct Hobbs Act review of the FCC rules, that the Act *prohibits* regulators from ordering incumbents to build new combinations of network elements that do not now exist. Thus, a WUTC order implementing the unlawful FCC rule and imposing the exact same requirement *also* violates the Act. The court below acknowledged that the Eighth Circuit had vacated the only legal authority on which the WUTC orders were based as contrary to the Act, and that *alone* should have ended the inquiry. Second, the Ninth Circuit overstepped its jurisdiction by second-guessing the Hobbs Act court and effectively redetermining the validity of the combination rules.

Moreover, by contradicting both the Eighth Circuit's holding and this Court's analysis, the court's illegitimate

decision precipitated the very kind of conflict that the Hobbs Act is intended to prevent. Acting on remand from this Court under its Hobbs Act authority, the Eighth Circuit recently reaffirmed its earlier determination that the combination rules were contrary to the Telecommunications Act. *See Iowa Utils. Bd. v. FCC*, No. 96-3321, — F.3d —, 2000 WL 979117, at *12-13 (8th Cir. July 18, 2000). The Eighth Circuit recognized that this Court's reasons for upholding a rule barring incumbents from tearing apart their existing networks before giving competitors access to them have nothing at all to do with the vacated rules requiring incumbents to custom-build entirely new configurations of elements at their competitors' requests. The no-separation rule prevents incumbents from imposing wasteful and gratuitous burdens on competitors. *See Iowa Utils. Bd.*, 525 U.S. at 395 (FCC could rationally prohibit incumbents from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants") (internal quotation marks and citation omitted). But the combination rules have nothing to do with such discrimination. Because these rules deal with elements that are not already combined, either the incumbent or its competitor will have to combine elements to provide a new service; leaving that task to the competitor when it buys the elements does not discriminate or impose any wasteful costs. Rather, it requires the competitor to incur the same costs that the incumbent would incur if it decided to offer a service requiring this new combination. Thus, the Court's rationale for reinstating the no-separation rule simply does not apply to the combination rules.

For that reason, the Eighth Circuit concluded that it was "not persuaded . . . that the Supreme Court's reinstatement of rule 51.315(b) affects our decision to vacate subsections (c)-(f)." *Iowa Utils. Bd.*, 2000 WL 979117, at *12. The court therefore reaffirmed that "subsections (c)-(f) violate the plain

language of the statute. We are convinced that rules 51.315(c)-(f) must remain vacated." *Id.* at *13.

Indeed, the court made a point of chiding the Ninth Circuit for second-guessing its earlier decision:

> Nor do we agree with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combinations rule. The Ninth Circuit *misinterpreted our decision* to vacate subsections (c)-(f). We did not, as the Ninth Circuit suggests, employ the same rationale for invalidating subsections (c)-(f) as we did in invalidating subsection (b). Rather, the issue we addressed in subsections (c)-(f) was who shall be required to do the combining, not whether the Act prohibited the combination of network elements.

Id. at *12 (citing *MCI* and *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3669 (U.S. June 29) (No. 99-1641), *pet. for reh'g filed* (U.S. July 24, 2000)) (emphasis added).

The Court should grant this petition in order to rein in the Ninth Circuit's jurisdictional overreaching and to correct its illegitimate and unlawful endorsement of a vacated federal regulation. Given the recent decision of the Eighth Circuit reaffirming the rules' invalidity on Hobbs Act review, certiorari is warranted at least in order to vacate the judgments below and remand the cases to the Ninth Circuit with instructions to follow the Eighth Circuit's determination.

II. THE NINTH CIRCUIT'S COLLOCATION DECISION IGNORES THIS COURT'S AUTHORITATIVE CONSTRUCTION OF THE TELECOMMUNICATIONS ACT AND STANDS IN DIRECT CONFLICT WITH A DECISION OF THE D.C. CIRCUIT.

The court below erred in upholding the WUTC's requirement that U S WEST permit MCImetro and AT&T to collocate their switching equipment on U S WEST's premises. First, the Ninth Circuit acknowledged that this Court had rejected the FCC's interpretation of "necessary." Even recognizing that core error, however, the Ninth Circuit inexplicably allowed the resulting collocation requirement to stand. Moreover, even after the D.C. Circuit, on direct review under the Hobbs Act, vacated the very same FCC standard that the WUTC had applied, the Ninth Circuit declined to reconsider its ruling to comply with that authoritative determination of the applicable federal law. The Court should grant this petition to bring the Ninth Circuit in line with this Court's interpretation of the statute and with the D.C. Circuit's determination that the FCC standard that the WUTC had applied was invalid.

The Act imposes on an incumbent LEC the duty to allow collocation of equipment that is "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Relying *solely* on the FCC's interpretation of "necessary" to mean "used" or "useful," *see supra* at 7 & 9, the WUTC found that it would be "useful" to MCImetro and AT&T to collocate its remote switching equipment on U S WEST's property, and it ordered U S WEST to place this equipment in its offices. *See* App. 89a-90a, 94a-95a.

This Court subsequently invalidated the FCC's legal interpretation, rejecting the agency's loose reading of "necessary" as contrary to the language of the Act and Congress's obvious intent. *Iowa Utils. Bd.*, 525 U.S. at 389.

Reviewing the FCC's similar interpretation of "necessary" in 47 U.S.C. § 251(d)(2), this Court held that "the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' . . . is simply not in accord with the ordinary and fair meaning of those terms." *Id.* at 389-90. Moreover, the Court concluded that Congress intended the term "necessary" to be a meaningful limit on regulators' power over incumbent carriers, and thus that the statute "requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and *giving some substance to* the 'necessary' and 'impair' requirements." *Id.* at 391-92 (second emphasis added). In other words, said the Court, declaring everything that may be "used or useful" to be "necessary" simply wrote the latter term out of the Act.

Under the same reasoning, the FCC's collocation standard also cannot stand. The statutory condition that physical collocation be "necessary" must be given "some substance," and not simply collapsed into "used" or "useful." Indeed, the *Ninth Circuit itself* appeared to concede that the WUTC's use of this definition was irreconcilable with this Court's opinion, acknowledging that, if the standards of the Administrative Procedure Act applied, "we might agree . . . that the agency's use of an improper definition of 'necessary' requires us to return the agreement to the agency for reconsideration." App. 10a. Nevertheless, the court let the WUTC's error pass. The court limited its review to determining whether the requirement was irreconcilable with the statute, and concluded that "[a]lthough the Act may not require the provision, it certainly does not proscribe it." App. 11a. But that conclusion is simply wrong. Indeed, the Ninth Circuit's own concession that the WUTC's "improper definition" would violate the APA confirms that the definition is "not in accordance with law." 5 U.S.C. § 706. The statute provides for collocation *only* where it is "necessary" for interconnection. Because this Court held that

the statutory term "necessary" must be given both "substance" and "an ordinary and fair meaning," any rule reading it as merely "used or useful"—and any application, as here, of such a rule—does indeed violate the Act.

The Ninth Circuit's refusal to give this Court's holding its full effect created a direct conflict with the D.C. Circuit. The FCC's collocation rule under § 251(c)(6) was based on the very same definition of "necessary" on which the WUTC had relied. *Compare Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd at 4776-77 ¶ 28, *with Local Competition Order*, 11 FCC Rcd at 15794 ¶ 579. On direct review of the FCC's order under the Hobbs Act, the D.C. Circuit invalidated the "used or useful" standard as contrary to the Act, relying on this Court's reasoning. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The court found the ordinary and fair meaning of "necessary" to be "fairly straightforward": "Something is *necessary* if it is *required* or *indispensable* to achieve a certain result." *Id.* at 422.[6] Therefore, the FCC's interpretation "seems overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)." *Id.*

The D.C. Circuit followed this Court's analysis in *Iowa Utilities Board*, and rightly noted that the intrusive nature of forced collocation of competitors' equipment on incumbents' property calls for a narrow interpretation of the statute:

> As is clear from the [Supreme] Court's judgment in *Iowa Utilities Board*, a statutory

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[6] Most other courts to consider the question had already reached the same conclusion. *See, e.g., U S WEST Communications, Inc. v. Jennings*, 46 F. Supp. 2d 1004, 1026 (D. Ariz. 1999); *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1182 (D. Or. 1999); *U S WEST Communications, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 981 (D. Minn. 1999). As one district court put it, "Anyone who has ever packed for a trip knows the difference between items that might be 'used and useful' versus items that are really 'necessary.'" *MCI Telecomms. Corp.*, 41 F. Supp. 2d at 1182.

> reference to "necessary" must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit "necessary" to *that which is required to achieve a desired goal*. The Court's admonition seems particularly relevant here where a broader construction of "necessary" under § 251(c)(6) might result in an *unnecessary* taking of private property.

Id. at 423 (first emphasis added). The D.C. Circuit thus ruled that the FCC's interpretation was "impermissibly broad" and "finds no support in the Act." *Id.* at 424. "In short, the FCC's interpretation of 'necessary' under § 251(c)(6) goes too far and thus 'diverges from any realistic meaning of the statute.'" *Id.* (citation omitted).

U S WEST petitioned the court below for rehearing or rehearing en banc to allow the court to correct its error in light of the D.C. Circuit's ruling on Hobbs Act review. The D.C. Circuit's decision eliminated any doubt that mere "usefulness" was an inappropriate standard for collocation under § 251(c)(6). The Ninth Circuit's refusal to reconsider its rulings in *MCI* and *AT&T* in light of that decision thus compounded its original error. Certiorari is warranted not only to resolve the circuit conflict, but also to vindicate this Court's own interpretation of the Telecommunications Act. At the very least, this Court should grant the petition, vacate the judgments in *MCI* and *AT&T*, and remand those cases to the Ninth Circuit with directions to follow this Court's interpretation in *Iowa Utilities Board* and the D.C. Circuit's decision in *GTE Service Corporation*.

III. THE COURT BELOW APPLIED A STANDARD OF REVIEW THAT GIVES STATE REGULATORS PLENARY AUTHORITY TO CREATE FEDERAL OBLIGATIONS AND DISABLES FEDERAL COURTS FROM ENSURING THAT THOSE REGULATORS FOLLOW FEDERAL LAW.

Congress defined a narrow role for state regulators in arbitrating interconnection disputes under the Act. State regulators must resolve disputes according to federal law, and when acting on federal authority, may impose only those conditions that are required by federal standards. Federal court review under § 252(e)(6) is the essential check on state regulators in this plan; indeed, it is the exclusive means for testing whether state regulators have exceeded their limited authority.

The decision below upends Congress's careful plan. By limiting federal courts to asking whether a state has violated an express prohibition of the Act, the court suggests that state regulators may impose whatever obligations they choose and give those obligations the force of federal law, just as long as they avoid doing something explicitly barred by Congress. Such an outcome would delegate to state regulators far more power than Congress ever intended—indeed, more power than Congress gave the FCC.

A. The Act Defines a Narrow Role for States in Approving Arbitrated Agreements, and Federal Court Review Is the Exclusive Tool for Ensuring that States Stay Within That Role.

As this Court has observed, Congress "unquestionably" took "the regulation of local telecommunications competition away from the states" when it passed the Telecommunications Act, at least "[w]ith regard to the matters addressed" by the legislation. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Section 251 of the Act directs

telecommunications carriers to open their networks in specific ways and negotiate with each other for access. *See* 47 U.S.C. §§ 251(a)-(c). Congress authorized the FCC to adopt rules implementing these standards, *see id.* § 251(d), and it forbade the states from taking any action inconsistent with the Act or the FCC rules implementing the Act. *See id.* § 261(c).

Section 252 sets the rules for negotiating and arbitrating interconnection agreements, and Congress established a limited role for the states in this process. A state regulator may arbitrate disputed issues, but only if the parties invoke its authority, and only on the specific questions the parties identify. *See id.* §§ 252(b)(1), (b)(4)(A). The state regulator must follow federal law in resolving disputes and may impose only three kinds of federal obligations on the parties: conditions to ensure compliance with the "requirements" of section 251 (together with the FCC rules implementing that section), pricing standards, and compliance timetables. *See id.* § 252(c)(1)-(3).

Federal district court review under § 252(e)(6) is the essential check for ensuring that state regulators obey federal law and stay within their permitted role. Indeed, it is the only check, since the Act bars state courts from reviewing these arbitrations. *See* 47 U.S.C. § 252(e)(4). This Court has acknowledged the authority of the federal district courts to ensure the primacy of federal law: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

In short, Congress carefully defined the relative domains of federal and state regulators. Under the Act, states are not simply "allowed to do their own thing"; rather, they "must hew" to the lines drawn by the FCC and federal courts. *Id.* But the decision below disables the federal courts from ensuring that states stay within those prescribed limits.

B. A Standard of Review That Authorizes Any and All State Action Not Directly Prohibited Threatens Federal Primacy.

The Ninth Circuit's standard of review frees state regulators to create federal law rather than apply it. The decision below suggests that any interconnection obligation a state regulator imposes in an arbitration will pass muster—whether or not it is actually based in the Act—unless the regulator has violated some specific statutory prohibition. This massive expansion of state power to create new federal regulatory obligations leaves state regulatory bodies with far more federal policymaking power than Congress ever intended.

Moreover, the court below simply dismissed as inapplicable the bedrock rule of administrative law: An agency cannot exercise federal authority without a specific delegation of power from Congress. Administrative agencies—even those with a mandate to serve the "public interest"—do not possess roving commissions to adopt whatever policies they see fit. *See NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669-70 (1976). If this case involved an FCC decision, it would be obvious that the agency could not create new regulatory obligations out of whole cloth without any specific authorization in the Act; it is accepted that the FCC does not "possess[] *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Comsat Corp v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997) (internal quotation marks omitted). Yet under the Ninth Circuit's standard of review, state regulators can exercise the plenary federal authority that even the FCC lacks, since the standard frees them from grounding their rules in any affirmative statutory grant of power, and even permits them to impose the very same duties that federal courts have held are beyond the statutory authority of the FCC.

The errors discussed in Sections I and II demonstrate the danger posed by the court's virtually meaningless standard of review. The court upheld two requirements that the WUTC had imposed based on federal regulations that were subsequently invalidated. At the time of the Ninth Circuit's review, the FCC rules applied by the WUTC had been vacated by courts acting under the Hobbs Act and the collocation and combination requirements thus lacked *any* basis in federal law. Rather than strike those requirements, however, the Ninth Circuit ruled that even without an affirmative legal basis, the requirements could stand so long as they were not *specifically prohibited* by the Act. Finding no such proscription, the court upheld the baseless requirements. *See* App. 9a, 11a.[7] Indeed, the court took its "hands off" approach to such an extreme that, even where it conceded that the WUTC had applied an improper legal standard, the court refused to correct the error:

> Were we reviewing this agreement under the judicial review standards of the Administrative Procedure Act, we might agree with U S West that the agency's use of an improper definition of "necessary" requires us to return the agreement to the agency for reconsideration. . . .
>
> . . . Here, our task is not to examine possible flaws in the WUTC's decision-making process,

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[7] Even under the Ninth Circuit's erroneous standard of review, both requirements should have failed. As petitioner showed in Sections I and II, both requirements have been determined to violate the plain language of the Act. *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) ("[T]he FCC's interpretation of 'necessary' under § 251(c)(6) [requiring physical collocation] goes too far and thus 'diverges from any realistic meaning of the statute.'") (citation omitted); *Iowa Utils. Bd. v. FCC*, No. 96-3321, — F.3d —, 2000 WL 979117, at *13 (8th Cir. July 18, 2000) (the combination requirements of 47 C.F.R. § 51.315(c)-(f) "violate the plain language of the statute").

> but to decide whether a provision resulting from that process—the provision requiring co-location—has resulted in an agreement that fails to "meet the requirements" of the Telecommunications Act.

App. 10a-11a (citations omitted).

The court derived its limited scope of federal court review from § 252(e)(6)'s language directing courts to examine whether a state-imposed obligation "meets the requirements of" § 251 and the regulations thereunder and the standards applicable under § 252. 47 U.S.C. § 252(e)(6); *see* App. 9a, 11a. But the natural reading of this language is that the court should ask whether the obligation is *affirmatively mandated* by § 251 or § 252; a duty that bears no connection to these sections (but is not contradicted by them) hardly meets their "requirements." Moreover, the court's statement that courts may not "examine possible flaws in [a state's] decision-making process" (App. 11a) wholly ignores § 252(e)(6)'s directive to consider whether the state has met the requirements of § 252; virtually all of that section deals with how states must conduct the arbitration process.

In short, the court below has interpreted the Act as a delegation of unbounded and unreviewable federal lawmaking power to state bodies. If left in place, the opinion will allow regulators in each state in the circuit to create new "federal" requirements out of whole cloth, and federal courts will be powerless to "bring [them] to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Thus, the Ninth Circuit will have transformed a statutory scheme intended to create a single body of federal telecommunications law into a patchwork of nominally "federal" requirements that vary from state to state. Certiorari is warranted to restore the primacy and uniformity of federal law and the vital role of federal court review in ensuring that state regulators "hew" to that law. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petitioner prays that this Court grant the petition for the purpose of vacating the judgment below and remanding the case to the Ninth Circuit with instructions to follow the decisions of the Eighth and D.C. Circuits.

Respectfully submitted,

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